

5

United States Circuit Court of Appeals
Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,

Appellant

v

No. 7753

CORNELL S. FRANKLIN,

Appellee

PETITION OF APPELLEE FOR REHEARING
AND, IN DUE COURSE, FOR AFFIRMANCE OR NEW TRIAL

BRIEF IN SUPPORT

CONSULAR REGULATIONS, CHINA, 1864 (Photostat)

Attorneys for Appellee: Frank E. Hinckley and
W. H. Lawrence, both of San Francisco, California
Of Counsel: Franklin & Harrington, Shanghai, China

FILED

FEB 11 1938

United States Circuit Court of Appeals Ninth Circuit

Appeal from
United States Court for China

WALTER CHALAIRE,

Appellant

v

No. 7753

CORNELL S. FRANKLIN,

Appellee

PETITION OF APPELLEE FOR REHEARING AND, IN DUE COURSE, FOR AFFIRMANCE OR NEW TRIAL

As grounds for rehearing and, in due course, for affirmance or new trial we respectfully present:

1 Appellate opinion omits to consider Section 4 of the Organic Act of the United States Court for China, 1906, which, in language used in the successive statutes from 1848 forward providing for extraterritorial jurisdiction, provides, by reference, for certain court procedure, that is for court procedure prescribed by Act of Congress, including, if taken as

procedural, *statute* of limitations, which no inclusion in Consular Regulations, China, 1864, could supersede and which it would seem improbable to any one mindful of the original cause for a *statute* of limitations and its universality in English and our own jurisprudence that any Judge, Consular or higher, would presume to replace with rule of court;

Also as ground, the patent error in appellate opinion of using *Wulfsohn v Russo-Asiatic Bank* as case authority on statute of limitations, whereas that case expressly disclaims itself to be authority on that point, the point not being before the appellate court for review; nor does that case show, as our case does, whether or not any issue existed as to which was applicable, Consular Regulations, Section 83, or one of the laws of the United States as provided in the Organic Act, Section 4;

On these two grounds we respectfully petition for rehearing and, in due course, with opportunity to each party on appeal to submit brief, we petition that there be substituted for the present appellate judgment of directed judgment in trial court the final appellate judgment of affirmance.

2 Or, should the foregoing petition be denied, we request consideration of the extraordinary situation that complainant below amended complaint by eliminating matters not in written contract, evidently apprehending the statute of limitations; that defendant

imperfectly pleaded, unless as to the statute; that the trial court in opinion dealt only with the statute and only on that basis gave judgment; and that by this fortuity of pleading and omission to adjudge except upon application of the statute, the full and true issue cannot be discerned from the transcript of record. This controversy, or we may say, difference, between members of the bar in China, was of a professional nature. The active practitioners before the court are few more than a handful and their standing before an international metropolitan community is to be well maintained. The matter could very properly have been negotiated or arbitrated. Above all it is clear that the issue was specially and intimately within the province of the extraterritorial trial court. On new trial,—and the appellate judgment left as it is will certainly necessitate some measure of new adjudication,—even with appellate opinion remaining as it is, the true issues could be given improved pleading, with probability of final disposition in trial court. We petition, alternatively, that there be substituted for directed judgment a judgment of new trial.

There follow: Brief in Support; also, as judicially noticeable, Consular Regulations, China, 1864 (Photostat).

Respectfully submitted,

FRANK E. HINCKLEY

W. H. LAWRENCE

Attorneys for Appellee

We hereby certify that in our opinion the foregoing petition is well founded in law and that it is not interposed for delay.

February 10, 1936

FRANK E. HINCKLEY

W. H. LAWRENCE

Attorneys for Appellee

**United States Circuit Court of Appeals
Ninth Circuit**

**Appeal from
United States Court for China**

WALTER CHALAIRE,

Appellant

v

No. 7753

CORNELL S. FRANKLIN,

Appellee

**BRIEF IN SUPPORT OF PETITION OF APPELLEE
FOR REHEARING AND, IN DUE COURSE, FOR AFFIRMANCE
OR NEW TRIAL**

POINTS OF ARGUMENT

1 Limitations of actions are by statute; a consular regulation is not a statute; the Judge of the United States Court for China, unlike judges generally, is empowered to apply, in absence of specific statute, a United States statute that he adjudges necessary and suitable for United States jurisdiction in China.

2 In the present appellate opinion sole reliance for limitation of action is upon a consular regulation invalid *ab initio* and never lawfully in force.

3 As one of the "laws of the United States", or, as the same Act of Congress containing these words next reads, a "statute", which the judge, in a case before him for adjudication, has power to adjudge suitable and to apply, is the District of Columbia code section on period of limitation of action on simple contract.

4 The special defenses, other than that of limitation, not having been passed upon in first instance, the mandate of the appellate court in case of reversal should be for new trial rather than for entry of a directed judgment.

5 Associate counsel at Shanghai bring to attention the following:

Right and early appellate determination of the present issue is, for the China jurisdiction, a most serious public necessity. If the present appellate judgment stands, many judgments of the United States Court for China are in error and voidable.

COMMENT ON POINTS OF ARGUMENT

1 Limitations of actions on contract are by statute, not otherwise. Whether such a statute is or is not procedural matters nothing.

A consular regulation is not a statute.

The Minister and Consuls could have no power to make a statute.

The Congress has, however, conferred upon the Judge of the United States Court for China power to adjudge necessary and suitable and, in pursuance of such adjudication, to apply laws of the United States additional to those which are specifically applicable.

We question whether this special judicial power, properly exercised, is subject to review. This power was not questioned in *Biddle v United States*.

To review a proper exercise of this power would be destructive of a very important judicial discretion in trial court. And there is not to be found in the extra-territorial jurisdiction statutes any provision for appellate jurisdiction to determine what, in the language of the statutes, is necessary, suitable, practicable, in conformity with treaties as locally and daily operative under direction of the Executive.

The power is distinct from authority to make procedural rules. Such rules would result from experience of administration of the offices of the court; also from course of adjudications. But the power

to apply one or another certain statute is distinctly a judicial power. To some extent all judges of higher courts at home have power of this nature, particularly those that have to apply the principles of conflicts of laws. How can it be strange or unreasonable that an extraterritorial court be empowered in larger measure as an aid to the Executive in fulfilling the obligations of the treaties?

Where else than in court when a specific question is presented would a judge disciplined in the principles of our law so normally and considerately exercise that special power? Would it be tolerable that an extraterritorial judge,—or would any such judge have the temerity,—announce in advance that he would apply such and such listed “laws of the United States”?

2 Consular Regulations, Section 83, never was lawfully in force, because, even if the Minister and Consuls in China had legislative power, they did not, with respect to this section, exercise the power in accordance with law. The enabling Act was that of June 22, 1860, particularly Section 5. (This section was re-enacted with some minima of change as Revised Statutes, Section 4117; and again as 22 United States Code, Section 146.) Reference to the text of the enabling Act is requested.

The Act enumerates the authorized subjects of consular regulations. The statute of limitations is not so enumerated.

3 Objection has been urged that a provision in the District of Columbia Code, such as that on limitation of actions, could not, with good reason, be held to be one of the laws of the United States applicable in China.

It will be noted that in Section 4 of the Act of Congress of June 22, 1860, Revised Statutes, Section 4086, relating to jurisdiction of extraterritorial courts, the expression "laws of the United States" is used interchangeably with the expression "statutes of the United States".

It is only when these "laws", "statutes", are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies that the common law, equity, admiralty, and the decrees and regulations shall be resorted to.

The principle of *Biddle v United States* (C C A 9, 1907) 156 F 759, essential to decision of that case, was that an enactment by Congress for a jurisdiction in which its legislative authority was exclusive, such as providing that obtaining money on false pretenses was a criminal offense, was such an expression of the will of Congress that it could be adjudged in China to be a law of the United States necessary and suitable to be applied there.

Of jurisdictions within which the legislative authority of Congress has been at some time exclusive there have been many. The territories were such. One by one, including Alaska, they were accorded by Congress some or full measure of legislative autonomy.

The District of Columbia remains exclusively controlled in legislation by Congress. Some of its laws, of course, are unsuitable in China. Most of its more general laws are suitable.

4 The trial court, having sustained the plea of the statute of limitations, had no need to pass upon the sufficiency of other defenses pleaded in the answer, and in fact did not consider such other defenses, as appears by the opinion of the court.

It is true, as the appellate court points out, that the answer admits most of the allegations of the complaint, and particularly the authenticity of the letter of February 10, 1927. But it is entirely possible that, notwithstanding the facts so admitted, there was no obligation to pay the sum demanded, either because of failure of consideration or because of absence of consideration or because of subsequent modification of the terms of the letter. On the face of the letter of February 10, the consideration is none too clear; Mr Chalaire binds himself to nothing; he is to have 60% of Mr Franklin's net earnings so long as he remains on vacation and until he has received 50,000 taels, but he does not bind himself to stay away from China.

It must be evident that defendant did not intend to concede that, even regardless of the statute of limitations, he had incurred the obligation. Perhaps his pleading is less than perfect; the circumstance that all the facts were familiar to plaintiff may have made the pleader careless. But it is peculiarly the function

of the trial court to pass upon the sufficiency, in matter of form, of pleadings. A motion for judgment on the pleadings can not serve as a special demurrer.

We submit that it will be not only proper, but may prevent a miscarriage of justice, to return the case to the trial court to be tried upon the issues, if any, other than that of limitation, and after such amendment of pleadings as the trial court, in its discretion, shall allow.

5 Associate counsel at Shanghai bring to attention the following:

Right and early appellate determination of the present issue is, for the China jurisdiction, a most serious public necessity.

Criminal prosecutions are in course in which the informations are laid under provisions of the District of Columbia Code.

Commercial law is taken by the American community in China to be that of the District of Columbia.

If the present appellate judgment stands, many judgments of the United States Court for China are in error and voidable.

For many years publication of summons has been in accord with suitable law of the District of Columbia.

Jurisdiction of divorce has attached and cause for divorce been pleaded on basis of the District of Columbia Code; and numerous divorce decrees have been made.

Statement in the appellate opinion that Consular Regulations, Sec. 83 (limitation of actions) was recognized and applied in *Wulfsohn v Russo-Asiatic Bank* occasions reference to that case at point where the opinion reads:

“ . . . the statute of limitations was not pleaded in any form to the cause of action set forth in the amended petition. In the absence of such a plea there is nothing before us for review.”

Nor was there any challenge whatsoever in *Wulfsohn v Russo-Asiatic Bank* as to which statute was the statute of limitations.

Omission of expressed appellate opinion as to bearing or not of *Biddle v United States* has brought serious doubts as to limits of the value of that decision.

The responsibility of the Circuit Court of Appeals in this matter is the more onerous because review of its decision by the Supreme Court of the United States could probably take only the usual course of petition to grant certiorari.

For the foregoing reasons the petition of appellee is for affirmance; alternatively for new trial.

February 10, 1936

Respectfully submitted,

FRANK E. HINCKLEY

W. H. LAWRENCE

Attorneys for Appellee

(Note: Appended photostat of Consular Regulations, China, 1864, is from Ho. Ex. Doc. Vol. I, No. 1, Part 2. 39th Cong., 1st Sess., 1866, p. 413-421. These continue in effect Consular Regulations made at earlier date and not inconsistent therewith.)

Mr. Burlingame to Mr. Seward.

No. 94.]

LEGATION OF THE UNITED STATES,
Peking, November 9, 1864.

SIR: I have the honor to send two decrees made by me, and approved by the consuls, in pursuance of the act of Congress approved June 22, 1860.

The *first* was rendered necessary by the irregularities of lawless men in connexion with the Chinese rebellion; the *second* by the act of Congress aforesaid.

It will be observed that the *second* decree is largely taken from forms made by the United States consul general at Constantinople, which have already been submitted by you to Congress. With our minister, the Hon. E. Joy Morris, I wish to bear witness to the ability of Mr. Godard in this respect, and to beg that the credit ascribed to these rules may be transferred to him. I wish also to express my thanks to George F. Seward, esq., consul general at Shanghai,

for many valuable practical suggestions. I am chiefly indebted to him for the fee bill. He came to Peking at my request to consult in relation to these decrees.

I have carefully compared these rules with those "framed for the supreme consular court, and other consular courts, in the dominions of the Sublime Ottoman Porte, under the order of her Majesty in council of the 27th day of August, 1860, by the judge of her Majesty's supreme consular court, and approved by one of her Majesty's principal secretaries of state;" and while I find them covering the same ground, I think those of Mr. Godard are less elaborate and more practical. Their adoption, as far as possible, in the very language of Mr. Godard, is a great advantage. They need but to be adopted in Japan to secure a uniform system throughout the east. Whatever other rules may be approved or rejected, I am sure that No. 44, which I inserted, will remain. It is this: "No consul shall recognize the claim of any American citizen arising out of a violation of the provisions of the act of Congress, approved February 17, 1862, relating to the 'coolie trade,' so called, nor any claim which involves the holding any person in slavery." I send also the circular of Mr. Seward, (marked A.) I also enclose the decrees as printed.

I have the honor to be, sir, your obedient servant,

ANSON BURLINGAME.

Hon. WILLIAM H. SEWARD,
Secretary of State.

SHANGHAI, November 1, 1864.

I have been directed by his excellency the honorable Anson Burlingame, United States minister plenipotentiary and envoy extraordinary to China, to publish the following decrees of 22d and 23d April last. Under the provisions of the act of Congress they become of binding force and effect from this date. Certified copies of the decrees have gone forward for simultaneous publication at the several ports.

GEO. F. SEWARD, *Consul General.*

Regulations for the consular courts of the United States of America in China.

In pursuance of section 5 of the act of Congress, approved June 22, 1860, entitled "An act to carry into effect certain provisions in the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, or for other purposes," I, Anson Burlingame, minister plenipotentiary and envoy extraordinary of the United States to the empire of China, do hereby decree the following rules and regulations, which shall have the force of law in the consular courts of China:

1. Every citizen of the United States residing within the limits of the ports open to foreign trade in the dominions of the Emperor of China is required to be enrolled in the consular register, and shall apply in person at the consulate within thirty days after the publication of this decree. Every American citizen who may arrive within the limits of the port, save and except any one who may be borne on the muster-roll of an American vessel, shall apply within ten days at the consulate to be enrolled. Any American citizen neglecting to be so enrolled will not be entitled to claim the protection or intervention of the authorities, unless he can furnish a valid reason for not so doing.

2. In all cases where an applicant to be enrolled cannot furnish a passport or other legal proof of his citizenship, he shall make oath that he is a citizen of the United States; and if the consul deem desirable, be required to bring such further evidence as he shall consider satisfactory.

ANSON BURLINGAME.

LEGATION OF THE UNITED STATES,
Peking, April 22, 1864.

Assented to:
PEKING, April 22, 1864.

Assented to:
CANTON July, 12, 1864.

Assented to:
SWATOW, September 3, 1864.

Assented to:
AMOY, August 30, 1864.

Assented to:
FOO-CHOW-FOO, 1864.

Assented to:
NINGPO, June 20, 1864.

Assented to:
HANKOW, June 11, 1864.

Assented to:
KINKIANG, June 13, 1864.

Assented to:
CHUNKIANG, June 2, 1864.

Assented to:
TIENTSIN, April 27, 1864.

GEO. F. SEWARD, *Consul General.*

OLIVER H. PERRY, *U. S. Consul.*

J. C. A. WINGATE, *U. S. Consul.*

OLIVER B. BRADFORD, *U. S. Vice-consul,*

A. L. CLARKE, *U. S. Vice-consul.*

EDWARD C. LORD, *U. S. Vice-consul.*

WM. BRECK, *U. S. Consul.*

H. G. BRIDGES, *U. S. Vice-consul.*

G. H. COLTON SALTER, *Acting U. S. Consul.*

S. W. POMEROY, JR., *U. S. Vice-consul.*

Regulations for the consular courts of the United States of America in China.

In pursuance of section 5 of the act of Congress, approved June 22, 1860, entitled "An act to carry into effect certain provisions in the treaties between the United States, China, Japan, Siam, Persia, and other countries, giving certain judicial powers to ministers and consuls, or other functionaries of the United States in those countries, or for other purposes," I, Anson Burlingame, minister plenipotentiary and envoy extraordinary of the United States to the empire of China, do hereby decree the following rules and regulations for the guidance of the consular courts in China:

I.—ORDINARY CIVIL PROCEEDINGS.

1. *How commenced.*—Civil proceedings between American citizens must commence by written petition verified by oath before the consul.

2. *Three classes of action.*—Ordinary personal civil actions are of three classes, viz: contract, comprising all cases of contract or debt; wrong, when damages are claimed for a wrong; replevin, when possession of a specified article is claimed.

3. *Demand necessary in contract and replevin.*—In contract, the petition must aver that payment, or a performance of the conditions of the contract has been demanded and withheld; and, in replevin, that the articles to be replevied have been demanded.

4. *Petitioner must deposit money.*—The petitioner shall be required to deposit a reasonable sum to defray the probable expenses of court and defendant's costs; subsequent deposits may be required, if found necessary.

5. *Notice to defendant.*—Upon deposit of the money, the consul shall order notice on the petition, in writing, directing defendant to appear before the court at a given day and hour to file his written answer on oath.

6. *Service.*—Notice must be served on each defendant at least five days before return day, by delivery of an attested copy of the petition and order, and of any accompanying account or paper.

7. Personal service should always be required when practicable.

8. *Default.*—On proof of due notice, judgment by default shall be procured against any defendant failing to appear and file his answer as required; but the default may be taken off for good cause within one day after, exclusive of Sunday.



9. *Damages*.—But in actions of wrong, and all others where the damages are in their nature unliquidated and indefinite, so that they cannot be calculated with precision from the statement of the petition, the amount of the judgment shall be ascertained by evidence, notwithstanding the default.

10. *Answer*.—If defendant appears and answers, the consul, having both parties before him, shall, before proceeding further, encourage a settlement by mutual agreement, or by submission of the case to referees agreed on by the parties, a majority of whom shall decide it.

11. *Amendments*.—Parties should, at the trial, be confined as closely as may be to the averments and denials of the statement and answer, which shall not be altered after filing except by leave granted in open court.

12. *American witnesses compelled to attend*.—On application of either party and advance of the fees, the counsel shall compel the attendance of any witness within his jurisdiction before himself, referees, or commissioners.

13. *Parties are witnesses*.—Each party is entitled and may be required to testify.

14. *Decrees to be obeyed*.—Judgment may be given summarily against either party failing to obey any order or decree of the consul.

15. *Attachment and arrest*.—For sufficient cause, and on sufficient security, the consul, on filing a petition, may grant a process of attachment of any defendant's property to a sufficient amount, or of arrest of any defendant not a married woman, nor in the service of the United States under commission from the President.

16. *Dissolution of attachment*.—Defendant may at any time have the attachment dissolved by depositing such sum, or giving such security, as the consul may require.

17. *Sale of perishable property*.—Perishable property, or such as is liable to serious depreciation under attachment, may, on petition of either party, be sold on the consul's order, and its proceeds deposited in the consulate.

18. *Release of debtor*.—Any defendant arrested or imprisoned on civil petition shall be released on tender of a sufficient bond, deposit of a sufficient sum, or assignment of sufficient property.

19. *Debtor's disclosure*.—Any person under civil arrest or imprisonment may have his creditor cited before the consul to hear a disclosure of the prisoner's affairs under oath, and to question thereon; and if the consul shall be satisfied of its truth and thoroughness, and of the honesty of the debtor's conduct towards the creditor, he shall forever discharge him from arrest upon that debt, provided that the prisoner shall offer to transfer and secure to his creditor the property disclosed, or sufficient to pay the debt, at the consul's valuation.

20. *Debtor's board*.—The creditor must advance to the jailer his fees and payment for his prisoner's board until the ensuing Monday, and afterwards weekly, or the debtor will be discharged from imprisonment and future arrest.

21. *Execution*.—On the second day after judgment (exclusive of Sunday) execution may issue, enforcing the same with interest at 12 per cent. a year, against the property and person of the debtor, returnable in thirty days, and renewable.

22. *Seizure and sale of property*.—Sufficient property to satisfy the execution and all expenses may be seized and sold at public auction by the officer after due notice.

23. Property attached on petition, and not advertised for sale within ten days after final judgment, shall be returned to the defendant.

24. *Final judgment for defendant*.—When final judgment is given in favor of defendant, his person and property are at once freed from imprisonment or attachment, and all security given by him discharged. And the consul may, at his discretion, award him compensation for any damage necessarily and directly sustained by reason of such attachment, arrest, or imprisonment.

25. *Offset*.—In actions of contract defendant may offset petitioner's claim by any contract claim, filing his own claim, under oath, with his answer. Petitioner shall be notified to file his answer seasonably, on oath, and the two claims shall then be tried together, and but one judgment given for the difference, if any be proved in favor of either party, otherwise for defendant's costs.

26. *Costs*.—Except, as hereinafter provided, the party finally prevailing recovers costs, to be taxed by him and revised by the consul.

27. *Trustee process*.—In contract the consul may order defendant's property or credits in a third party's hands to be attached on the petition by serving him with due notice as trustee, provided petitioner secures trustee his costs by adequate special deposit.

28. *Trustee's costs*.—If adjudged trustee, the third party may retain his costs from the amount for which he is adjudged trustee if sufficient; otherwise the balance of trustee's costs must be paid out of petitioner's special deposit, as must the whole of his costs if not adjudged trustee.

29. *Demand on trustee upon execution*.—The amount for which a trustee is charged must be inserted in the execution, and demanded of him by the officer within ten days after judgment, or all claim on him ceases. Process against property or person of the trustee may issue ten days after demand.

30. *Debt must be at least ten dollars*.—If petitioner recovers judgment for less than ten dollars, or if less than ten dollars of defendant's property or credits is proved in the third party's hands, in either case the third party must be discharged with costs against petitioner.



31. *Replevin*.—Before granting a writ of replevin the consul shall require petitioner to file a sufficient bond, with two responsible sureties, for double the value of the property to be replevied, one an American citizen, or petitioner may deposit the required amount.

II.—TENDER, ETC.

32. Before a creditor files his petition in contract, his debtor may make an absolute and unconditional offer of the amount he considers due by tendering the money in the sight of the creditor or his legal representative.

33. *Deposit*.—If not accepted, the debtor shall, at his own risk and paying the charges, deposit the money with the consul, who shall receipt to him and notify the creditor.

34. *Demand or withdrawal*.—It shall be paid to the creditor at any time, if demanded, unless previously withdrawn by the depositor.

35. *Costs*.—If the depositor does not withdraw his deposit, and, upon trial, is not adjudged to have owed petitioner at the time of the tender more than its amount, he shall recover all his costs.

36. *Offer to be defaulted*.—At any stage of a suit in contract or wrong, defendant may file an offer to be defaulted for a specific sum and the costs up to that time; and if petitioner chooses to proceed to trial, and does not recover more than the sum offered and interest, he shall pay all defendant's costs arising after the offer, execution issuing for the balance only.

III.—REFERENCE.

37. When parties agree to a reference, they shall immediately file a rule, and the case be marked "referred;" a commission shall then issue to the referees, with a copy of all papers filed in the case.

38. *Award and acceptance*.—The referees shall report their award to the consul, who shall accept the same and give judgment and issue execution thereon, unless satisfied of fraud, perjury, corruption, or gross error in the proceedings.

39. *When transmitted to minister*.—In cases involving more than five hundred dollars, if his acceptance is withheld, the consul shall at once transmit the whole case, with a brief statement of his reasons, and the evidence therefor, to the minister, who shall give his judgment on the award, or grant a new trial before the consul.

IV.—APPEAL.

40. *Must be within one day*.—Appeals must be claimed before three o'clock in the afternoon of the day after judgment, (excluding Sunday;) but in civil cases, only upon sufficient security.

41. *To be perfected within five days*.—Within five days after judgment the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the minister, with a copy of docket entries and of all papers in the case.

V.—NEW TRIAL.

42. *Because of perjury*.—On proof of the perjury of any important witness of the prevailing party upon a material point affecting the decision of a suit, the consul who tried it may, within a year after final judgment, grant a new trial on such terms as he may deem just.

43. *Generally*.—Within one year after final judgment in any suit not involving more than five hundred dollars, the consul who tried it, or his successor, may, upon sufficient security, grant a new trial where justice manifestly requires it; if exceeding five hundred dollars, with the concurrence of the minister.

VI.—HABEAS CORPUS.

44. *Slaves not to be held*.—No consul shall recognize the claim of any American citizen arising out of a violation of the provisions of the act of Congress approved February 19, 1862, relating to the "coolie trade," so called, nor any claim which involves the holding any person in slavery.

45. *Habeas corpus*.—Upon application of any person in writing and under oath, representing that he or any other person is enslaved, unlawfully imprisoned, or deprived of his liberty by any American citizen within the jurisdiction of a consul, such consul may issue his writ of *habeas corpus*, directing such citizen to bring said person, if in his custody or under his control, before him, and the question shall be determined summarily, subject to appeal.

VII.—DIVORCE.

46. *Libels for divorce must be signed and sworn to before the consul, and on the trial each party may testify*.

47. *Attachment*.—The consul, for good cause, may order the attachment of libeller's property to such an amount and on such terms as he may think proper.

48. *Husband to advance money.*—He may also, at his discretion, order the husband to advance his wife, or pay into court, a reasonable sum to enable her to prosecute or defend the libel, with a reasonable monthly allowance for her support pending the proceedings.

49. *Alimony.*—Alimony may be awarded or denied the wife on her divorce, at his discretion.

50. Custody of the minor children may be decreed to such party as justice and the children's good may require.

51. *Release of both.*—Divorce releases both parties, and they shall not be re-married to each other.

52. *Costs.*—Costs are at the discretion of the consul.

VIII.—MARRIAGE.

53. *Record and return.*—Each consul shall record all marriages solemnized by him or in his official presence.

IX.—BIRTHS AND DEATHS.

54. The birth and death of every American citizen within the limits of his jurisdiction shall likewise be recorded.

X.—BANKRUPTCY, PARTNERSHIP, PROBATE, ETC.

55. Until promulgation of further regulations, consuls will continue to exercise their former lawful jurisdiction and authority in bankruptcy, partnerships, probate of wills, administration of estates and other matters of equity, admiralty, ecclesiastical and common law, not specially provided for in previous decrees, according to such reasonable rules not repugnant to the Constitution, treaties, and laws of the United States, as they may find necessary or convenient to adopt.

XI.—SEAMEN.

56. In proceedings and prosecutions instituted by or against American seamen, the consul may, at his discretion, suspend any of these rules in favor of the seamen when, in his opinion, justice, humanity and public policy require it.

XII.—CRIMINAL PROCEEDINGS.

57. *How commenced.*—Complaints and informations against American citizens should always be signed and sworn to before the consul when the complainant or informant is at or near the consul's port.

58. *How authenticated.*—All complaints and informations not so signed and sworn to by a citizen of the United States, and all complaints and informations in capital cases, must be authenticated by the consul's certificate of his knowledge or belief of the substantial truth of enough of the complaint or information to justify the arrest of the party charged.

59. *Copy of accusation.*—No citizen shall be arraigned for trial until the offence charged is distinctly made known to him by the consul in respondent's own language. In cases of magnitude, and in all cases when demanded, an attested copy (or translation) of the complaint, information, or statement, authenticated by the consul, shall be furnished to him in his own language, as soon as may be after his arrest.

60. *Presence of accuser.*—The personal presence of the accuser is indispensable throughout the trial.

61. *May testify.*—He shall be informed of his right to testify and cautioned that if he chooses to offer himself as a witness, he must answer all questions that may be propounded by the consul or his order, like any other witness.

62. *American witnesses compelled to attend.*—The government and the accused are equally entitled to compulsory process for witnesses within their jurisdiction; and if the consul believes the accused to be unable to advance the fees, his necessary witnesses shall be summoned at the expense of the United States.

63. *Fine and cost.*—When punishment is by fine, costs may be included or remitted at the consul's discretion. An alternative sentence of thirty days' imprisonment shall take effect on non-payment of any part of the fine or costs adjudged in any criminal proceeding.

64. Any prisoner, before conviction, may be admitted to bail by the consul who tries him, except in capital cases.

65. *Capital cases.*—No prisoner charged with a capital offence shall be admitted to bail where the proof is evident, or the presumption of his guilt great.

66. *After conviction.*—After conviction and appeal the prisoner may be admitted to bail only by the minister.

67. *American bail.*—Any citizen of the United States offering himself as bail shall sign and swear, before the consul, to a schedule of unincumbered property of a value at least double the amount of the required bail.

68. *Foreign bail.*—Any other proposed bail or security shall sign and swear before the consul to a similar schedule of unincumbered personal property within the local jurisdiction of the consulate, or he may be required to deposit the amount in money or valuables with the consul.

69. *Two sureties.*—Unless such sufficient citizen becomes bail, or such deposit be made, at least two sureties shall be required.

70. *Surrender.*—Any American bail may have leave of the consul to surrender his principal on payment of all costs and expenses.

71. *Prosecutor may be required to give security.*—Any complainant, informant, or prosecutor may be required to give security for all costs of the prosecution, including those of the accused; and every complainant, &c., not a citizen of the United States, shall be so required, unless, in the consul's opinion, justice will be better promoted otherwise; and when such security is refused the prosecution shall abate.

72. *Honorable acquittal.*—When the innocence of the accused, both in law and intention, is manifest, the consul shall add to the usual judgment of acquittal the word "honorably."

73. *Costs.*—In such case judgment may be given and execution issued summarily against any informer, complainant, or prosecutor for the whole costs of the trial, including those of the accused, or for any part of either, or both, if the proceeding appears to have been groundless and vexatious, originating in corrupt, malicious, or vindictive motives.

74. *Minor offences.*—Consuls will ordinarily encourage the settlement of all prosecutions not of a heinous character by the parties aggrieved or concerned.

XIII.—OATHS.

75. *Oaths* shall be administered in some language that the witness understands.

76. *Not Christians.*—A witness not a Christian shall be sworn according to his religious belief.

77. *Atheist.*—An avowed atheist shall not be sworn, but may affirm, under the pains and penalties of perjury; the credibility of his evidence being for the consideration of the consul.

78. *Affirmation.*—A Christian, conscientiously scrupulous of an oath, may affirm, under the pains and penalties of perjury.

XIV.—DOCKETS, RECORDS, ETC.

79. *Civil docket.*—Each consul shall keep a regular docket or calendar of all civil actions and proceedings, entering each case separately, numbering consecutively to the end of his term of office, with the date of filing, the names of the parties in full, their nationality, the nature of the proceeding, the sum or thing claimed, with minutes and dates of all orders, decrees, continuances, appeals, and proceedings, until final judgment.

80. *Criminal.*—He shall keep another regular docket for all criminal cases, with sufficient similar memoranda.

81. *Filing papers.*—All original papers shall be filed at once and never removed; no person but an officer of the consulate or minister should be allowed access to them. All papers in a case must be kept together in one enclosure, and numbered as in the docket, with the parties' names, the nature of the proceeding, the year of filing the petition, and of final judgment conspicuously marked on the enclosure, and each year's cases kept by themselves in their order.

XV.—LIMITATION OF ACTIONS AND PROSECUTIONS.

82. *Criminal.*—Heinous offences not capital must be prosecuted within six years; minor offences within one.

83. *Civil.*—Civil actions, based on written promise, contract, or instrument, must be commenced within six years after the cause of action accrues; others within two.

84. *Absence; fraudulent concealment.*—In prosecutions for heinous offences not capital, and in civil cases involving more than \$500, any absence of respondent or defendant for more than three months at a time from China shall be added to the limitation; and in civil cases involving more than \$100, the period during which the cause of action may be fraudulently concealed by defendant shall likewise be added.

XVI.—GENERAL PROVISIONS.

85. *Trials public.*—All trials and proceedings in the United States consular courts in China shall be open and public.

86. *Interpreting and translating.*—Papers and testimony in a foreign language shall be translated into English by a sworn interpreter appointed by the consul; in civil cases to be paid by petitioner. Oaths and questions shall be translated by the interpreter from the English for any witness who does not understand English.

87. *Testimony.*—Parties may be required to file their petitions, answers, complaints, informations, and all other papers addressed to the court in English; or they may be translated by the interpreter at the consul's discretion. All testimony must be taken in writing in open court by the consul or his order, and signed by the witness, after being read over to him for his approval and correction, and it shall form part of the papers in the case.

88. *Adjournment.*—The consul may adjourn his court from time to time and place to place within his jurisdiction, always commencing proceedings and giving judgment at the consulate.

89. *Officer.*—All processes not served by the consul personally must be executed by an officer of the consulate, who shall sign his return, specifying the time and mode of service, and annexing an account of his fees.

90. *Copies on appeal.*—On appeal, copies of all the papers must be paid for in advance by the appellant, except in criminal cases where respondent is unable to pay.

91. *Copies.*—Any person interested is entitled to a copy of any paper on file, on prepayment of the fee.

92. Reasonable clearness, precision, and certainty should be required in the papers, and substantial justice and all practicable despatch is expected in the decisions.

93. *Definition of consul.*—The word "consul" is intended to include the consul general, and any vice-consul or deputy consul actually exercising the consular power at any consulate, unless the sense requires a more limited construction.

94. *Associates.*—Each associate in a consular trial shall, before entering on his duties, be sworn by the consul. Before taking the oath he may be challenged by either party, and for sufficient cause excused and another drawn.

95. *Contempt.*—Consuls will always preserve order in court, punishing summarily any contempt committed in their presence, or any refusal to obey their lawful summons or order, by imprisonment not exceeding twenty-four hours, or by fine not exceeding fifty dollars and costs.

96. *Attorney.*—Every party to a civil or criminal proceeding may be heard in person, or by attorney of his choice, or by both; but the presence of counsel shall be under the exclusive control and discretion of the consul.

97. *Accounts.*—The accounts of the consular courts shall be kept in United States currency; and every order of deposit, decree of costs, taxation of fees, and, generally, every paper issuing originally from the court, shall be expressed in dollars and cents, and satisfied in United States metallic currency, or its equivalent.

XVII.—FEES.

98. In consular court—

In all cases where the amount in question is not more than \$500..... \$5 00

In all cases where it is over \$500..... 15 00

In all cases where no specific damages are sought, the fee shall be \$5 for minor, and

\$15 for greater cases.

99. Clerk's fees—

For issuing all writs, warrants, attachments, or other compulsory process..... 1 50

For docketing every suit commenced..... 1 00

For executions..... 1 00

For summonses and subpoenas..... 50

For all records at the rate of, for each hundred words..... 20

For drawing every notice, paper, order, or process, not otherwise provided for..... 2 00

And if it exceed 200 words, for every additional hundred words..... 1 00

For every seal to process issued..... 1 00

For filing each paper upon the return of the marshal, and all other papers filed in court..... 10

100. Marshal's fees—

For apprehending a deserter and delivering him on board the vessel deserted from, to be paid by the vessel before leaving port..... 5 00

For searching for the same, and if not found, to be certified by the consul, and on his order to be paid by said ship..... 2 00

For serving any writ, warrant, attachment, or other compulsory process, each person..... 2 00

For serving summonses..... 1 00

For returning all writs, attachments, warrants, and summonses, each..... 50

For each bail-bond..... 1 00

For every commitment or discharge of prisoner..... 2 00

On subpoenas for each witness summoned..... 50

For returning subpoena..... 25

For each day's attendance upon court..... 3 00

For levying execution..... 1 50

For advertising property for sale..... 2 00

For releasing property under execution, by order of plaintiff..... 3 00

For selling property under execution when the amount collected does not exceed \$1,000..... 5 per cent.

If over \$1,000, and not exceeding \$5,000..... 3 per cent.

If over \$5,000..... 2 per cent.

For making collections under \$200, in cases where no adjudication has taken place 5 per cent.

If the amount exceed \$200..... 2½ "

For travelling fees in serving all processes, each mile..... \$0 15

For serving every notice not hereinafter provided for, in addition to the usual travelling fees..... 0 50

101. Interpreter's fees—	
For each day's attendance upon court.....	3 00
For making translations.....	2 00
If more than 200 words, for each additional hundred.....	1 00
102. Witnesses' fees—	
For every day's attendance at court.....	1 50
For each mile travelled in going to and returning from court.....	0 15
103. Crier's fees.—	
On trial of every suit.....	1 00
104. Citizen associate's fees—	
For each day's attendance.....	3 00
105. Costs for prevailing party—	
All necessary court fees paid out.	

XVIII.—PROVISO.

106. All decrees heretofore issued by authority of the commissioners and ministers of the United States to China, which are inconsistent in whole or in part with the provisions of this decree, are hereby annulled, and those portions are henceforth void and of no effect; and the promulgation of these rules abrogates no authority hitherto lawfully exercised by consuls in China not inconsistent herewith.

ANSON BURLINGAME.

LEGATION OF THE UNITED STATES TO CHINA,
Peking, April 23, 1864.

- | | |
|--|--|
| Assented to:
PEKING, April 23, 1864. | GEO. F. SEWARD, <i>Consul General.</i> |
| Assented to:
CANTON, July 12, 1864. | OLIVER H. PERRY, <i>U. S. Consul.</i> |
| Assented to:
SWATOW, September 3, 1864. | J. C. A. WINGATE, <i>U. S. Consul.</i> |
| Assented to:
AMOY, August 30, 1864. | OLIVER B. BRADFORD, <i>U. S. Vice-consul.</i> |
| Assented to:
FOO-CHOW-FOO, 1864. | A. L. CLARKE, <i>U. S. Vice-consul.</i> |
| Assented to:
NINGPO, June 20, 1864. | EDWARD C. LORD, <i>U. S. Vice-consul.</i> |
| Assented to:
HANKOW, June 11, 1864. | WM. BRECK, <i>U. S. Consul.</i> |
| Assented to:
KIUKIANG, June 13, 1864. | H. G. BRIDGES, <i>U. S. Vice-consul.</i> |
| Assented to:
TIENTSIN, April 27, 1864. | S. W. POMEROY, JR., <i>U. S. Vice-consul.</i> |
| Assented to:
CHINKIANG, June 2, 1864. | G. H. COLTON SALTER, <i>Acting U. S. Consul.</i> |

[Circular No. 3.—A.]

CONSULATE GENERAL OF UNITED STATES,
Shanghai, October 25, 1864.

SIR: I have the honor to transmit to you herewith a certified copy of each of the decrees of April last, which have already received your approval. They will be made public at this port on the day named in the notification, and it is expected that they will reach you in time for circulation on the same date.

In reply to inquiries which have been made, I have to state that no new forms of processes have as yet been prescribed. The experience of the various consular officers will readily effect the changes which may become necessary under the new regulations.

The fee headed "in consular court" is, together with all fines imposed, to be brought to the credit of the United States in the account required by section 17th of the act of Congress. The clerks' and marshals' fees may, as heretofore, be passed to those officers.

The judicial report, form 132, should be regularly transmitted, as required in section 312,

Consul's Manual. In the absence of a marshal it may be prepared by the clerk of the court, or by the consul himself. I should recommend that the "court account" should also be transmitted quarterly.

It is expected that the decree of registry will be very useful in preventing to an extent the abuse of the national name, which has been so common in China. The various officers will, I think, find it of much advantage to insist strenuously upon the registry of all persons under their jurisdiction.

In cases when an offender, who is not registered, and who has no satisfactory proof in support of his claim to citizenship, is arrested and handed to you for punishment, you will perhaps find it desirable to deliver him to the Chinese authorities. In such case the condition may be made, that the native officer shall sit at the trial with two consular officers as assessors, who shall have power to veto his decision. If, however, you should prefer to proceed yourself with the trial, it has been held at Peking that the offender, having submitted himself to the jurisdiction of the court, must abide by its decision.

Your obedient servant,

GEORGE F. SEWARD,
United States Consul General.

United States Consul.

